82-1920

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

STATE OF ALABAMA,

Petitioner

V.

WILLIAM SANFORD ELEY, II AND HONORABLE
WILLIAM R. GORDON, CIRCUIT JUDGE,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA;
THE COURT OF CRIMINAL APPEALS
OF ALABAMA AND THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

OF

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR PETITIONER

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QUESTIONS PRESENTED

1. Did this Honorable Court's decision and opinion in Illinois v. Vitale, (447 U.S. 410, 65 L. Ed. 2d 228, 100 S. Ct. 2260 [1980]) overrule, supersede, modify or limit the rule of double jeopardy announced by this Honorable Court in Blockburger v. United States, (284 U.S. 299, 76 L. Ed. 306, 52 52 S. Ct. 180 [1932])?

2. Where a party in the same sequence of events drives under the influence of intoxicating liquor and assaults another person with his automobile, does a conviction for driving under the influence of intoxicating liquor constitute former jeopardy as to a charge of reckless assault, where driving under the influence and reckless assault share no common element, driving under the influence does not necessarily

involve or constitute recklessness and the State proves or offers to prove numerous reckless acts in addition to driving under the influence?

THE PARTIES

In the Honorable Circuit Court of Montgomery County, Alabama, the parties were: The State of Alabama, in whose name the prosecution was brought and who is the Petitioner herein, and William Sanford Eley II, who is a Respondent herein.

In the Court of Criminal Appeals and Supreme Court of Alabama the real parties in interest were the same state of Alabama, Petitioner in the mandamus proceeding and William Sanford Eley II, a Respondent in the same proceeding. The nominal parties in said State Appellate Courts were: Honorable William R.

Gordon, Circuit Judge, Respondent Judge in the mandamus proceeding and a Respondent here and James H. Evans, District Attorney and Charles A. Graddick, Attorney General, Relators in the mandamus proceeding.

The matters presented by this petition were first raised in the Circuit Court of Montgomery County, Alabama, by Respondent Eley's Pleas of Autre fois convict and former jeopardy. The State of Alabama joined issue on said plea on the basis of the matters raised herein. These matters have been at issue throughout the State Court proceedings.

TABLE OF CONTENTS

TABLE OF CONTENTS (CON'T)

TABLE OF CASES

TABLE OF CASES (CON'T)

TABLE OF CASES (CON'T)

TABLE OF CONSTITUTIONAL PROVISIONS

TABLE OF STATUTES

OPINIONS BELOW

The opinion and order of the Honorable Circuit Court of Montgomery County, Alabama, dismissing the prosecution of William Sanford Eley II is not and will not be reported. The same is submitted as Appendix "A" to this brief.

The decisions and opinions of the Court of Criminal Appeals and Supreme Court of Alabama dismissing the State's appeal from the above order on the grounds that the Governor had inadvertently "pocket vetoed" the statute authorizing the State to appeal are reported as follows:

State v. Eley, 423 So. 2d 303 (Cr. App. Ala., 1982) and

Ex parte: State; In re: State v. Eley, 423 So. 2d 305 (S. Ct. Ala., 1982)

Since said attempted appeal was collateral to this case and neither Court addressed nor even mentioned the matters at issue in the instant proceeding, these decisions and opinions are of historical interest only, and the record will not be burdened by appending them hereto.

The order of the Court of Criminal Appeals of Alabama denying without opinion the State of Alabama's petition for a writ of mandamus to review the order of the Circuit Court dismissing the prosecution on grounds of former jeopardy is not as yet reported but will be reported as:

> Ex parte: State; Ex rel. Graddick & Evans; In re: State v. Eley, ____ So. 2d ____ (Cr. App. Ala., 1983)

A copy of the same is submitted as Appendix "B" hereto.

The order of the Supreme Court of Alabama denying without opinion the State of Alabama's petition for a writ of certiorari is not reported as yet but will be reported as follows:

> Ex parte: State; In Re: Ex parte: State; Ex rel Graddick & Evans; In Re: State v. Eley, ____ So. 2d ____ (S. Ct. Ala., 1983)

A copy of the same is submitted as Appendix "C" hereto.

JURISDICTION

The order of the Supreme Court of Alabama denying certiorari was issued April 8, 1983, and this petition is filed within sixty (60) days of said date:

The jurisdiction of this Honorable Court is invoked under Title 28, United States Code, Section 1257(3)

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States, which reads as follows:

> "No person shall be held to answer for capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (Emphasis supplied)

2. Section one of the Fourteenth Amendment to the Constitution of the United States which reads as follows:

> "...All persons born or naturalized in the United States, and subject to the jursidiction thereof, are citizens of the

United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws...."

STATUTORY PROVISIONS INVOLVED

Respondent Eley was charged with assault in the first degree under Title 13A, Section 13A-6-20(a)(3), Code of Alabama, 1975, which is submitted as Appendix "D" hereto. The portion of this statute under which Respondent Eley was charged reads as follows:

"§13A-6-20. Assault in the first degree.

"(a) A person commits the crime of assault in the first degree if:...

"(3) Under circumstances manifesting extreme indifference to the value of human

> life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to any person...."

Respondent Eley obtained dismissal of the assault charge on the grounds that his conviction for driving under the influence of intoxicating liquor allegedly constituted former jeopardy as to the assault charge. Eley's conviction for the traffic offense was under Section 25-68, Montgomery [Alabama] City Code, 1980, which is submitted as Appendix "E" hereto.

STATEMENT OF THE CASE AND THE FACTS

This case arose out of an incident on December 31, 1981, in Montgomery, Alabama, in which Respondent William Sanford Eley II drove his automobile into that driven by Mrs. Karen H.

Hellums, causing massive injuries to her. At the hearing before the Honorable Trial Judge the State represented that if permitted to try this case it would show that the collision resulted from Eley's being highly intoxicated, speeding, driving inattentively, running a blinking red light and failing to yield the right-of-way. Respondent Eley was charged with driving under the influence[1], a misdemeanor under Montgomery City ordinances. (See Appendix "E") Eley was ultimately convicted of driving under the influence, paid a fine and received a suspended sentence. Respondent Eley was also charged with assault in the first degree

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[1]The full title of this offense is: "Driving under the influence of intoxicating liquors or beverages, narcotics or barbiturate drugs." In the interest of brevity and clarity this offense will be referred to herein as "driving under the influence."

under State statutes. Title 13A, Section 13a-6-20(a)(3), Code of Alabama, 1975; Appendix "D". (R.[2] pp. 4-6 and 21-22; see Appendix "A" pp. 1-5 and 24)

The indictment of Respondent Eley read as follows:

> "The Grand Jury of said [Montgomery] County charge that before the finding of this indictment, WILLIAM SANFORD ELEY II, whose name is to the Grand Jury otherwise unknown, did, under circumstances manifesting extreme indifference to the value of human life, recklessly engage in conduct which created a grave risk of death to another person and did thereby cause serious physical injury to Karen H. Hellums by operating a motor vehicle while the same William Sanford Eley II was under the influence of intoxicating beverages, and did cause said motor vehicle to run into, over, upon, against or collide with the motor vehicle in which Karen H. Hellums was driving, thereby causing

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[2]"R" refers to the Exhibit to the mandamus petition.

> serious physical injury to the said Karen H. Hellums, in violation of Section 13A-6-20 of the Code of Alabama, against the peace and dignity of the State of Alabama. (R. pp. 1-2)

On arraignment Respondent Eley pleaded not guilty and not guilty by reason of insanity. Seven days later he entered a plea of autre fois convict and former jeopardy claiming that his driving under the influence conviction barred the assault charge. The Honorable Respondent, as Judge of the Circuit Court of Montgomery County, overruled this plea on the grounds that the two offenses were not the same. However, Respondent Eley renewed this plea on June 24, 1982. (R. pp. 3-7) It is the ruling on this renewed plea of former jeopardy which is at issue in this case.

On September 1, 1982, the Honorable Trial Judge dismissed the assault

indictment on the basis of Respondent Eley's former jeopardy claim. His Honor's lengthy opinion is submitted as Appendix "A" to this petition and is merely highlighted here. His Honor noted that Eley's claim rested on Illinois v. Vitale, (447 U.S. 410, 65 L. Ed. 2d 228, 100 S. Ct. 2260 [1980]).[3] It was conceeded and found that unless Vitale radically altered the law, Eley's claim of former jeopardy had to be rejected.[4]

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[3]"...Defendant [Eley] rests his plea on Illinois v. Vitale, 447 U.S. 410 (1980) -- with all respect, a case simply written, but with a labyrinthian result. Before examining Vitale, certain fundamental concepts of double jeopardy should be noted...." (R. p. 23, Appendix "A", p. 7)

[4]"...Defendant [Eley] concedes, as he must, that application of Blockburger [v. United States, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 (1932)] to the instant case requires that the plea be overruled. However, he earnestly

His Honor then analyzed Vitale and concluded that in that case this Honorable Court had established a new test for former jeopardy which disallows any evidence of conduct relating to a former conviction. Under His Honor's understanding of Vitale, the State would not be allowed to introduce any evidence which in any way related to driving under the influence. Since the indictment mentioned driving under the influence as part of the means of the assault, His Honor concluded that the indictment had

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footnote 4 con't:

contends that Vitale has modified Blockburger and that application of the modified test requires the court to sustain the plea.

Additionally, prior to Vitale, there is little reason to question but that under the facts of the case sub judice, the plea fails...." (R. p. 24, Appendix "A", p. 9)

to be dismissed. (R. pp. 21-34, Appendix "A")

Six days later the State of Alabama initiated a long and thus far utterly unsuccessful effort to get an appellate court to review the merits of His Honor's ruling. The State first attempted an appeal under a new state statute. This attempt failed when the Court of Criminal Appeals of Alabama ruled that the Governor had inadvertantly "pocket vetoed" the law giving the State the right to appeal. (R. pp. 35-36; State v. Eley, 423 So. 2d 303 [Cr. App. Ala., 1982]; cert. den. 423 So. 2d 305 [S. Ct. Ala., 1982]) Then the State instituted the instant proceeding as a mandamus action against the Honorable Trial Judge.[5] The State's petition was filed

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[5]Mandamus is the only remedy available to the State under Alabama Law in this situation. Ex parte: Nice, 407 So. 2d 874 (S. Ct. Ala. 1981)

in the Court of Criminal Appeals of Alabama on January 5, 1983 and denied without opinion on January 10, 1983. (Appendix "B") On January 20, 1983, the State applied for rehearing and requested the finding of facts; both were denied without opinion on January 24, 1983. (Appendix "B") The State's petition for a writ of certiorari was denied without opinion by the Alabama Supreme Court on April 8, 1983. (Appendix "C")

SUMMARY OF THE ARGUMENT

The State of Alabama has sought and is seeking review of the Honorable Respondent's ruling not just because his ruling is erroneous but because the ruling is based on an erroneous legal theory, which will of necessity prevent the State from trying the case under a new indictment.

The Alabama Courts expressly stated that they were not following this Honorable Court decision in Blockburger v. United States, (284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 [1932]). The Alabama Courts claimed to have followed instead Illinois v. Vitale, (447 U.S. 410, 65 L. Ed. 2d 228, 100 S. Ct. 2260 [1980]), which the State Courts held overruled, superceded or modified Blockburger. It follows that if Blockburger is still sound law, this case should be reversed summarily.

The decision of the Alabama Courts is in patent conflict with this Honorable Court's decision and opinion in Illinois v. Vitale, (447 U.S. 410, 65 L. Ed. 2d 228, 100 S. Ct. 2260 [1980]) in every way. There are conflicts with the case in general, conflicts with each of the four points stated or implied by the

majority of this Honorable Court, and conflicts with the two points made by the Honorable dissenters, in this Honorable Court. Most importantly, this Honorable Court in Vitale and subsequent cases relied heavily on Blockburger v. United States, (284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 [1932]), while the Honorable Alabama Trial Judge held that Vitale overruled, superceded or modified Blockburger.

ARGUMENT

INTRODUCTION

This petition represents the State of Alabama's seventh effort to obtain appellate review of the Honorable Trial Judge's ruling that Illinois v. Vitale, (447 U.S. 410, 65 L. Ed. 2d 228, 100 S. Ct. 2260 [1980]) overruled, superceded or modified this Honorable Court's classic

decision in Blockburger v. United States, (284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 [1932]). The State has sought such review, not merely because His Honor's ruling is incorrect but because of the legal theory on which His Honor based his ruling. His Honor's reading of Vitale is that, once a party is convicted of certain conduct, no evidence relating to that conduct can be introduced in a prosecution for an other offense arising out of the same transaction. For example, if a person commits a robbery, a rape and a murder using a pistol, he could, under this Court's decisions be separately tried, convicted and sentenced for robbery, rape and murder. Blockburger v. United States, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 (1932); Iannelli v. United States, 420 U.S. 770, 43 L. Ed. 2d 616, 95 S. Ct. 1284 (1975).

However, under His Honor's approach, if the person was first convicted of possession of a pistol without a permit, he could be convicted of these other offenses only if the prosecution could prove its case without any reference to a pistol.

In the instant case, if the State reindicted Eley for assault, it could easily prove recklessness by showing Eley's speeding, inattentive driving, running the blinking red light and failure to yield the right-of-way, but any evidence of these facts would also tend to show that Eley was driving under the influence, and would, under His Honor's understanding of Vitale, have to be excluded. Of course, once trial commenced and the State found that all of its evidence was excluded, because of the necessary implications of His Honor's

erroneous theory, it would be too late to seek review. The State would have to rest with its case unproven and await the unavoidable verdict of acquittal.

REASONS FOR GRANTING THE WRIT

I.

CONFLICT WITH BLOCKBURGER V. UNITED STATES (284 U.S. 299 [1932])

The classic case on former jeopardy as to different offenses in the same sequence of events is Blockburger v. United States, (284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 [1932]). Blockburger held that for purposes of double jeopardy, offenses based on the same facts are subject to separate prosecution if they are not the same, and they are not the same if each has one element in its corpus delecti that is not included

in that of the other. Blockburger v. United States, Gore v. United States, 357 357 U.S. 386, 2 L. Ed. 2d 1405, 78 S. Ct. 1280 (1958); Iannelli v. United States, 420 U.S. 770, 43 L. Ed. 2d 616, 95 S. Ct. 1284 (1975); Albernaz v. United States, 450 U.S. 333, 67 L. Ed. 2d 275, 101 S. Ct. 1137 (1981). Thus offenses are the same for jeopardy purposes, even if they have different names, if they have the exact same elements of their corpus delecti. Missouri v. Hunter, ____ U.S. ____, 74 L. Ed. 2d 535, 103 S. Ct. ____ (1983) On the other hand, where the corpus delecti of an offense is contained in its entirety in the corpus delecti of another offense, the two are the same for jeopardy purposes. In re: Nielsen, 131 U.S. 176, 33 L. Ed. 118, 9 S. Ct. 672 (1889); Harris v. Oklahoma, 433 U.S. 682, 53 L. Ed. 2d 1054, 97 S. Ct. 2912 (1977); Brown v. Ohio, 432 U.S. 161, 53

L. Ed. 2d 187, 97 S. Ct. 2221 (1977) But, where two offenses each have at least one uncommon element in their corpus delecti, they are not the same for jeopardy purposes. This is the well established rule which this Honorable Court has consistently followed.

There is no need to burden this Honorable Court with a lengthy discussion of the differences between drunk driving and assault. As defined by the statutes, Appendicies, "D" and "E", the two offenses share no elements at all. Most significantly, it was conceded by Respondent Eley and found by the Honorable Respondent Trial Judge, that under Blockburger Eley's former jeopardy claim must fail. The issue in this case is not whether the State Courts followed this Honorable Court's decision in

Blockburger, they admittedly did not. The issue here is whether Blockburger still represents good law. If it does, then the Alabama Courts have embarked on a grossly wrong course in pursuing the Double Jeopardy Clause of the Fifth Amendment to the Constitution.

The Alabama Courts reached their decision in an effort to follow Illinois v. Vitale, (447 U.S. 410, 65 L. Ed. 2d 228, 100 S. Ct. 2260 [1980]). As will be discussed below, they misapplied Vitale in every way. If, as is argued below, Vitale did not overrule, supercede or modify Blockburger, as the Alabama Courts found, it would appear that this case ought to be summarily reversed.

II.

CONFLICT WITH ILLINOIS V. VITALE (447 U.S. 410 [1980])

A.

IN GENERAL

The case of Illinois v. Vitale, (447 U.S. 410, 65 L. Ed. 2d 228, 100 S. Ct. 2260 [1980]) was substantially identical to the instant case. There an individual by reckless conduct with his motor vehicle killed two children. He was convicted of a traffic offense in an inferior court, and the state courts held that under the Double Jeopardy Clause the misdemeanor conviction barred a prosecution for manslaughter. In re: Vitale, 71 Ill 2d 229, 16 Ill. Dec. 456, 375 N.E. 2d 87 (1978) This Honorable Court reversed, holding: (1) The misdemeanor conviction would bar the felony prosecution if, and only if, the misdemeanor was always an element of

manslaughter. and (2) Vitale would have a substantial double jeopardy claim only if the state relied solely on the conduct represented by the misdemeanor conviction to prove an element of manslaughter.

In the instant case, Eley by recklessly operating his vehicle severely injured a lady. He was convicted of a traffic offense, and the state courts have held that, although driving under the influence and assault, have no common elements, neither is an element of the other and the state offered to prove numerous other unlawful and reckless acts, the misdemeanor conviction barred the felony prosecution. This holding is in patent conflict with what this Honorable Court ruled in Vitale.

This obvious conflict will be examined in some detail in the subsections below.

B.

CONFLICT WITH THE MAJORITY OPINION IN VITALE

As mentioned above, the Illinois Courts in Vitale dismissed the prosecution before trial. This Honorable Court vacated and remanded. As to dismissal before trial, this Court held that the conviction for failure to reduce speed (Vitale's misdemeanor) was a bar to manslaughter prosecution if, and only if, the traffic offense was always a necessary element of manslaughter with an automobile. Under Alabama law, as found by the Honorable Respondent Trial Judge, driving under the influence is not an element of assault. Thus, in dismissing this prosecution, the Alabama Courts ruled contrary to Vitale on this point.

Then, this Court wrote:

"...Of course, any collision between two automobiles or between an automobile and a

> person involves a moving automobile and in that sense a 'failure' to slow sufficiently to avoid the accident. But such a 'failure' may not be reckless or even careless, if, when the danger arose, slowing as much as reasonably possible would not alone have avoided the accident. Yet, reckless driving causing death might still be proved if, for example, a driver who had not been paying attention could have avoided the accident at the last second, had he been paying attention, by simply swerving his car. The point is that if manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the 'same' under the Blockburger test. The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution. (447 U.S. 410, 419, 65 L. Ed. 228, 237) (Emphasis supplied)

This language is of extreme importance because it demonstrates that this Court was aware that the State of Illinois would not be able to prove a case against

Vitale without offering evidence of the same conduct which was represented by the misdemeanor conviction. Yet, obviously this Honorable Court found no jeopardy problems with this situation. This is in absolute conflict with the Alabama Court's ruling that any evidence of conduct represented by the misdemeanor conviction would be inadmissible in the felony prosecution.

This Honorable Court in Vitale then went on to discuss the problem of the State's relying on Vitale's failure to reduce speed as THE RECKLESS ACT necessary to prove manslaughter. As the language quoted above demonstrates, the Court was aware that the State of Illinois would have to show a reckless failure to reduce speed in order to prove its case, and the Court held that, if the State relied entirely on such conduct to

prove an element of the manslaughter case, then a substantial double jeopardy claim would arise. However, this court noted that there were indications of other offenses in record[6] and saw no need to resolve a claim which might never arise.

In the instant case, there is no need to wonder if the State will rely on driving under the influence to prove that Eley was reckless. Alabama law is very strict on drunk driving. The statement, "I had only two or three beers," is a confession to the offense. However, by the same token, it can not be argued that driving under the influence, as defined

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6"...The police report concerning Vitale's accident noted that the brakes on the automobile were defective and that there had been a school crossing guard and a stop sign at the intersection where the accident occurred. (Record 29, 30)...." (Note 7, 447 U.S. 410, 418, 65 L. Ed. 2d 228, 237)

by Alabama law, necessarily involves recklessness, and the Alabama Courts have rejected such an argument. Evans v. State, 36 Ala. App. 145, 53 So. 2d 764 (1951)[7] In fact, the Alabama Courts have held that driving under the influence does not necessarily involve even negligence. Chattahoochee Valley Railway Co. v. Williams, 267 Ala. 464, 103 So. 2d 762 (1958)[8] Thus, if in the assault prosecution the State proved only that Eley drove under the influence and

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[7]"...It is not necessary for the prosecution to establish that the degree or extent of intoxication had reached the stage where it would interfere with the proper operation of the vehicle..." (53 So. 2d 764, 766)

[8]"...Likewise, in the instant case, the intoxication of plaintiff, if he was in fact intoxicated, would not in and of itself alone constitute such contributory negligence as to bar his recovery if plaintiff 'nevertheless exercised the care of a reasonably prudent driver' on the occasion of the accident which is the basis for this suit...." (103 So. 2d 762, 766)

collided with Mrs. Hellums' automobile, Eley would be due to be acquitted, not on grounds of former jeopardy but on grounds of the insufficiency of the evidence. Thus, the holding of the State Courts conflicts with that of the majority opinion of this Honorable Court in Vitale on four different points: (1) Dismissing the prosecution before trial; (2) Ruling that a misdemeanor which is not an element of a felony bars the felony prosecution; (3) holding that evidence of conduct represented by a misdemeanor conviction is inadmissible in a felony prosecution and (4) ruling that a felony prosecution must be dismissed if the state must prove conduct represented by a misdemeanor conviction, even though the such conduct can, at most constitute only part of the evidence of an element of the felony.

C.

CONFLICT WITH THE DISSENTING OPINION IN VITALE.

As strange as it may seem, the Alabama Trial Judge in this case managed to rule contrary to, not only the Vitale majority opinion but to the dissenting opinion as well. This is all the more remarkable, because His Honor thought that he was relying heavily on Justice Steven's dissent.

In this dissenting opinion, Justice Stevens makes two points: First,

> "...[T]he Illinois Supreme Court made a finding that failing to reduce speed to avoid a collision is a lesser-included offense of reckless homocide as a matter of state law..." (447 U.S. 410, 422, 65 L. Ed. 2d 228, 239).

And, second:

> "...even if the State intended to rely on evidence other than respondent's failure to reduce speed to establish the element of reckless driving necessary for a homicide conviction, the

> prosecutor's failure to apprise the respondent and the court of such a theory at some point in the lengthy proceedings on the double jeopardy issue should bar the second trial in this case...." (Ibid)

Applying the Vitale Dissenters' views to the instant case, the double jeopardy clause would not bar the assault prosecution. The Honorable Trial Judge expressly held that driving under the influence was not an element of assault with an automobile. No Alabama Court has ever held that driving under the influence bears any legal relationship at all to assault, and such a holding would be outlandish.[9] In addition, the State

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[9]If driving under the influence was an element of assault with an automobile, a person who ran down a citizen could escape liability by proving that he had not been drinking.

advised the Honorable Trial Court of its intention to prove reckless acts in addition to drunk driving[10] and indeed, as noted above (see pages 27-29), such proof would be essential even without the former jeopardy problem.

Therefore, even under the Vitale dissent, Eley in this case has no double jeopardy claim.

D.

CONFLICT WITH VITALE'S TREATMENT OF BLOCKBURGER V. UNITED STATES, (284 U.S. 299 [1932])

The Honorable Trial Judge ruled that it was obvious that under this Honorable

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[10]The Honorable Trial Judge found:

> "...The state represented that in addition to evidence of intoxication, at trial it expects to introduce evidence of speeding, inattentive driving, running a blinking red light and failure to yield the right-of-way, thereby avoiding the bar of the double jeopardy clause...." (R. 30, Appendix "A", p. 24)

Court's decision in Blockburger v. United States, (284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 [1932]), Eley had no former jeopardy claim in the assault prosecution. However, His Honor found that Vitale represented an effort on the part of this Honorable Court to modify, supercede or overrule Blockburger.

Did Vitale overrule, supersede or limit Blockburger? The Petitioner will not presume to tell this Honorable Court what it intended. However, nothing in the Vitale majority opinion suggests such an intention. On the contrary the Court goes to great lengths to show how the Illinois Courts may have misapplied the Blockburger rule to Illinois Law. The majority opinion cites Blockburger by name five (5) times in Vitale and relies on it throughout the opinion. The Petitioner State suggests that Vitale represents an effort to preserve and

follow Blockburger, not to limit it. The dissenting opinion likewise presents no question of Blockburger's viability.

The apparent continued viability of Blockburger is clearly demonstrated by a case decided nine (9) months after Vitale. Albernaz v. United States, 450 U.S. 333, 67 L. Ed. 2d 275, 101 S. Ct. 1137 (1981) Albernaz was a unanimous decision but not a unanimous opinion. After stating the issue in the case, the Albernaz majority stated:

> "...The answer to the petitioners' contention is found, we believe, in application of the rule announced by this Court in Blockburger v. United States, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 (1932) and most recently applied last term in Whalen v. United States, 445 U.S. 684, 63 L. Ed. 2d 715, 100 S. Ct. 1432 (1980)[11]..." (450 U.S. 333, 337, 67 L. Ed. 2d 275, 280)

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[11]Actually, the most recent application of Blockburger prior to Albernaz was in Vitale.

The Albernaz majority then goes on to decide the case under Blockburger, specifically mentioning that case nine (9) additional times. Three of the four Vitale dissenters concurred in Albernaz. They agreed with the majority's conclusion but disagreed with certain of Their Honor's statements; the basis of the concurrers' position was Blockburger. Albernaz v. United States, 450 U.S. 333, 335, 67 L. Ed. 2d 275, 286, 101 S. Ct. 1137 (1981)

In an even more recent case, Missouri v. Hunter (___ U.S. ____, 74 L. Ed. 2d 535, 103 S. Ct. ____, [1983]) the Court again cited and relied on Blockburger, citing the case nine (9) times. It would appear that Blockburger continues to represent the Constitutional standard for former jeopardy in the post-Vitale world, except in Alabama.

CONCLUSION

In conclusion, the Petitioner, the State of Alabama, respectfully submits that the decisions and opinions of the Honorable Respondent Judge, the Circuit Court of Montgomery County, Alabama, Court of Criminal Appeals and the Supreme Court of Alabama in this case present conflicts with the prior decisions and opinions of this Honorable Court. For this reason the Petitioner prays that this Honorable Court will issue the writ of certiorari and review the decisions and opinion of the Honorable Courts of Alabama and on such review will reverse the decisions of said Courts dismissing the indictment of Respondent Eley.

Respectfully submitted,

CHARLES A. GRADDICK
ATTORNEY GENERAL

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this _____ day of May, 1983, I did serve the requisite number of copies of the foregoing on the Attorney for William Sanford Eley II and Honorable William R. Gordon, Circuit Judge, Respondents, by mailing same to him, first class postage

prepaid and addressed as follows:

Honorable Maury Smith
P. O. Box 78
c/o Smith, Bowman, Thagard, Crook
and Culpepper
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